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State and Local Taxation—Installtion of Elevators in Building Taxable Under State Sales Tax—Effect of Title Retention Clause and Designation of Elevators as Personal Property

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It is apparent from the language of the *Ball* case and succeeding decisions that the Missouri courts have, with the aid of the statute, in effect applied the gift theory since in each case it is the donor's intent which is the subject of inquiry. If the Missouri cases have been correctly decided on the theory of gift rather than the theory of contract,[27] then it follows that the issue as to the parol evidence rule in these joint deposit cases is a spurious one in Missouri.

In the light of this analysis it would seem that the Kansas City Court of Appeals properly admitted parol evidence in the *Watts* case. When a similar case is presented to the Supreme Court, it is believed that the rule of the *Watts* case should be affirmed.[28]

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STATE AND LOCAL TAXATION—INSTALLATION OF ELEVATORS IN BUILDING TAXABLE UNDER STATE SALES TAX — EFFECT OF TITLE RETENTION CLAUSE AND DESIGNATION OF ELEVATORS AS PERSONAL PROPERTY.—Relator-Otis Elevator Company brought certiorari against the State Auditor of Missouri in the circuit court to review the assessment by the auditor of a 2 per cent sales tax levied under Sections 11407 (b) (g) and 11408 Revised Statutes of Missouri, on intrastate sales of tangible personal property. The trial court quashed the Auditor's finding and he appealed to the Supreme Court, where in an opinion in Division 2, the trial court's judgment was affirmed in part and reversed

27. "The right of a codepositor to funds deposited by the owner thereof in an account in the name of the owner and the codepositor, has, in several states, been upheld on the theory that under the contract between the depositors and the bank, the codepositor is entitled to the deposit on the death of the original owner of the funds deposited. It seems clear, however, that in such case there must be an intention on the part of the original owner of the funds to make a gift to the other joint depositor. Even assuming the existence of a third party beneficiary contract, the depositor other than the one originally owning the money is the donee of a property interest.

"The contract may supply the formalities necessary to render a gift effective. And it may be evidence of intent to make a gift. But it cannot in reason conclusively show an intent to make a gift so as to preclude showing that the deposit was made in this form for some other purpose." 7 AM. JUR. BANKS §436.

28. The Missouri Supreme Court in Gordon v. Erickson *et al.*, 356 Mo. 272, 201 S.W.2d 404 (1947) held that the evidence was insufficient to defeat the survivor's rights, but is it clearly implied that evidence is admissible to show the donor's true intent. The statute apparently was not considered.

in part. Later, on motion of the court, the cause was transferred to the court *en banc*, where the same opinion was again adopted. Respondent-Elevator Company filed a motion for rehearing, asking for a clarification of the opinion without reargument. A unanimous second opinion, in conformity with the first, was then substituted.[1]

Respondent is a foreign corporation which designs, constructs, and installs elevators under three types of contracts: (1) contracts with contractors or building owners, by which respondent agrees to place the elevator in the building in its completed form, *i.e.*, all labor and materials are furnished by respondent; (2) the same type of contracts for the reconstruction or repair of elevators; (3) mere oral contracts covering minor repairs and the furnishing of small parts for elevators. The evidence in the case showed that the materials for the class 1 and 2 contracts constituted about 70 per cent of the total costs, so the State Auditor assessed the tax on that amount. On the class 3 contracts, since respondent admitted it was responsible for the tax both as to labor and materials if it was liable at all, the tax was based on 100 per cent of the contract cost.

Section 11408, Revised Statutes of Missouri, reads in part:

> From and after the effective date of this Act, there shall be and is hereby levied and imposed and shall be collected and paid: (2) Upon every retail sale in this State of tangible personal property a tax equivalent to two (2) per cent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to two (2) per cent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange.

And Section 11407 (g) likewise states:

> 'Sale at retail' means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration; . . .

Respondent contended, and the trial court agreed, that no "sale at retail" had taken place because the respondent itself "used and consumed" the materials in fulfilling the terms of its

1. State *ex rel.* Otis Elevator Co. v. Smith, 357 Mo. 1055, 212 S.W.2d 580 (1948).

contracts, which specified the installation of completed elevators. Thus respondent claimed that in carrying out the terms of the contract, the materials were added to and became a part of the realty, and thus lost their status as "tangible personal property." Evidence was introduced to show that the respondent designed and installed each individual elevator in compliance with rigid specifications, and that no elevator would fit into a shaft other than the one for which it was designed, even if in the same building.[2]

The Supreme Court recognized the nature of the services performed by respondent as annexing the elevators so that they became a part of the realty, but nevertheless held against respondent as to the class 1 and 2 contracts because of a so-called "title-retention clause" inserted therein. This clause reads as follows:

> It is agreed that all the apparatus furnished hereunder can be removed without material injury to the freehold, and we [the respondent] retain title thereto until final payment in cash is made, with the right to retake possession of the same or any part thereof at your [the land or building owner's] cost if default is made by you in any of the payments, irrespective of the manner of attachment to the realty, . . .[3]

The Court expressly stated that, in the absence of this clause, no tax could be levied on the sales.[4] However, although agreeing that the materials had been "used and consumed" in a sense, the holding was that the parties had expressly agreed that the materials in the class 1 and 2 contracts came under the heading of tangible personal property which could be removed without damage to the freehold and hence were subject to the tax although, admittedly, respondent's title was a conditional one.[5] Naturally, under this reasoning the court held for respondent as to the class 3 contracts, which were oral.

The determination that, in the absence of the title retention

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2. The different specifications required for each elevator are discussed in detail on pp. 4-5 of the first opinion written by Judge Ellison in Division 2.

3. *Id.* at 5.

4. State *ex rel.* Otis Elevator Co. v. Smith, 357 Mo. 1055, 1061, 212 S.W.2d 580, 584.

5. The court was not impressed with respondent's argument that, under the reasoning of Mutual Acceptance Corp. v. Canole, 342 Mo. 1170, 119 S.W.2d 820, where the vendee was liable for the *ad valorem* property tax on property held under a conditional sales contract, respondent could not be taxed in the instant case. It distinguished the case, *id.* at 1061, 212 S.W.2d at 583.

clause, the materials were affixed to the realty, hence used and consumed by respondent in carrying out his contractual duties and not taxable under the sales tax, seems in accord with the authorities generally.[6] Further, the modern view is that the most important element in determining whether an item has become a fixture is the intent of the parties,[7] and this would seem to fix the elevators' status as realty. The court was faced with a Missouri decision, *City of St. Louis v. Smith*,[8] which would seem to put at rest the argument that, in contracts such as these, the materials consumed can be taxed under the sales tax. The *City of St. Louis* case was a suit for a declaratory judgment in which the city asked for an adjudication as to whether it was liable, under the sales tax law, for taxes on materials purchased by contractor engaged in constructing streets, sewers, and a hospital. The case held that, since there was an inseparable commingling of labor and material, the materials became a part of the street or building, and hence the taxable transaction was the sale from the dealer to the contractor. The case did not specifically hold that the contractor is not liable as a seller to the landowner, but both parties in the instant case so regarded it.[9]

In reaching the result of taxability as to the materials used in the class 1 and 2 contracts, however, the court has taken an unusual approach to the taxation problem, and seems to have had some difficulty with its reasoning. A careful reading of the first opinion handed down by Division 2 (but never published) seems to indicate little distinction between the two opinions.

6. Wood Preserving Corp. v. State Tax Commission, 235 Ala. 438, 179 So. 254 (1938); Duhame v. State Tax Commission, 65 Ariz. 268, 179 P.2d 252 (1947); State v. J. Watts Kearny & Sons, 181 La. 554, 160 So. 77 (1934); State v. Christhilf, 170 Md. 586, 185 Atl. 456 (1936); Acorn Iron Works v. State Board of Tax Administration, 295 Mich. 143, 294 N.W. 126 (1940); City of St. Louis v. Smith, 342 Mo. 317, 114 S.W.2d 1017 (1938); Albuquerque Lumber Co. v. Bureau of Revenue, 42 N.M. 58, 75 P.2d 334 (1937); Atlas Supply Co. v. Maxwell, 212 N.C. 624, 194 S.E. 117 (1937); State Board of Equalization v. Stanolind Oil & Gas Co., 54 Wyo. 521, 94 P.2d 147 (1939). Contra: Wiseman v. Gillioz, 192 Ark. 950, 96 S.W.2d 459 (1936); Moore v. Pleasant Hasler Construction Co., 50 Ariz. 317, 72 P.2d 573 (1937); Bradley Supply Co. v. Ames, 359 Ill. 162, 194 N.E. 272 (1935); Blome v. Ames, 365 Ill. 456, 6 N.E.2d 841 (1937). The cases *contra* seemingly have either been overruled or can be distinguished; see Acorn Iron Works v. State Board of Tax Administration, 295 Mich. 143, 148, 294 N.W. 126, 128 (1940).

7. Brown, Personal Property §141 (1936).

8. 342 Mo. 317, 114 S.W.2d 1017 (1938).

9. See p. 3 of the first opinion written by Judge Ellison in Division 2.

Both rely heavily upon the five cases cited by the Auditor,[10] three of which involved elevator contracts similar to these.[11] These cases held that, when there is a title retention clause inserted in such a contract, the clause is binding between the parties and their privies, except where the removal of the materials would result in substantial *physical* damage to the buildings involved. Respondent argued that the title retention clause was a mere security title in the nature of a lien, but the court was impressed with what it considered the unfairness of permitting respondent to operate in such a manner as to denominate the material personal property for security purposes, and nevertheless avoid the sales tax on the basis that the material was not personal property.[12] Thus the court stated:

> . . . if by the act of attaching them to the real estate they are converted into realty and the title passes to the landowner they will not be subject to the tax because it does not go against real estate. But even though the materials be attached to the real estate and in that sense be "used and consumed," yet if the parties by their contract have preserved the legal status of the materials as personalty under the rule stated in the authorities cited . . ., then they are subject to the tax, notwithstanding [sic] the Elevator Company retained a conditional title until the contract price had been paid in full.[13]

There has been increasing recognition in recent years of the necessity for increasing the scope of state taxation. A narrow

10. Detroit Cooperage Co. v. Sistersville Brewing Co., 233 U.S. 712 (1914); Wheat v. Otis Elevator Co., 23 F.2d 152 (5th Cir. 1927); Woodliff v. Citizens' Building & Realty Co., 240 Mich. 413, 215 N.W. 343 (1927); General Motors Acceptance Corp. v. Farm & Home Savings & Loan Ass'n, 227 Mo.App. 832, 58 S.W.2d 338 (1933); Harvard Financial Corp. v. Greenblatt Construction Co., 261 N.Y. 169, 184 N.E. 748 (1933).

11. Wheat v. Otis Elevator Co., Woodliff v. Citizens' Building & Realty Co., Harvard Financial Corp. v. Greenblatt Construction Co., *supra* note 10.

12. Thus on p. 7 of the first opinion written by Judge Ellison in Division 2, the court, after pointing out that the Auditor's authorities involved the "instant relator," stated that the Auditor's contention was that ". . . the relator Elevator Company here is blowing both hot and cold in seeking refuge behind the St. Louis Case, first reviewed herein, on the theory that the materials entering into the construction of its elevators and escalators are "used and consumed"; whereas, on the other hand, it bases its right to remove them on the fact that it sells them under a conditional sales contract in which it retains title and stipulates that they can be removed without material injury to the freehold. . . ." But is it not true that, in many areas of the law of sales, title to the same personal property is in different parties for different purposes?

13. State *ex rel.* Otis Elevator Co. v. Smith, 357 Mo. 1055, 1060, 212 S.W.2d 580, 583 (1948).

interpretation of the commerce clause of the United States Constitution by the United States Supreme Court has consistently prevented the state from obtaining much-needed revenues.[14] There is, then, a forceful argument which can be made in favor of adopting a pragmatic view of state tax measures.[15] Although such a view was not articulated in the instant case, it may serve as a justification of the Missouri court's position. Nevertheless, it is submitted that the court has reached an unfortunate result.

Following the *rationale* of the Missouri court the taxability of transactions of this nature will depend upon whether or not security title has been retained. This would hardly seem a valid basis for imposing a sales tax. This means that, in the future, contractors and assemblers will take other measures to obtain the desired security. Thus there is no long-range solution to the state revenue problem, and the argument which supports the decision, based upon a pragmatic view of state taxation measures, loses much of its validity. It is unreal to make the determination of whether the building owner is the ultimate consumer of the materials involved turn upon a contract stipulation as to the *situs* of title; this is especially true where the statement as to title is inserted for security purposes. The majority view that materials to be consumed by a contractor are not sold at retail to the building owner within the meaning of the sales tax laws would seem to be a salutary one; to call this a sale of tangible personal property is to be guilty of the "lump concept thinking" which has so often troubled courts in other fields of the law.

If the legislature wishes to place a tax upon the contractor and to treat him as a vendor in order to plug what might seem to be a void in the general tax scheme, it is free to do so. In the meanwhile, it would seem unwise of the court to seize upon the question of title for security purposes, and do violence to established concepts in the law of taxation of fixtures, in order to bring the materials within the Missouri sales tax. As one critic has already stated:

14. For an exposition of this theory, and an interesting solution to it, see Hellerstein and Hennefeld, *State Taxation in a National Economy*, 54 Harv. L. Rev. 949 (1941).

15. The pragmatic approach seems to have captured the field of federal taxation. For a discussion of this in relation to the oft-discussed Helvering v. Halleck, 309 U.S. 106 (1940), see Oliver, *Property Rationalism and Tax Pragmatism*, 20 TEX. L. REV. 675 (1942).

> This is a good example of the uncritical application of general legal doctrine to a tax case. The recitals in the contract as to the removability of the elevators and equipment and as to title were inserted for security reasons. They have no bearing whatever on the determination as to whether the taxpayer is to be treated, for retail sales tax purposes, as the consumer of the cages, cables, shafts, etc. which go into an elevator installation . . . . whatever the solution to be reached, it should not be determined by the niceties of the law of the title.[16]

CHARLES C. ALLEN III

TORTS—LIABILITY OF RESTAURANT OWNER FOR DEATH RESULTING FROM EATING POISONED FOOD UNDER WRONGFUL DEATH STATUTE—QUANTUM OF PROOF. Plaintiff and her husband became ill two hours after eating a meal of corned beef in the defendant-restaurant. Plaintiff brought suit against the restaurant under the Mississippi wrongful death statute for the death of her husband, who died of ptomaine poisoning eight days after eating the corned beef. The trial judge directed a verdict for the defendant after the close of the plaintiff's evidence. The Supreme Court of Mississippi affirmed the judgement of the trial court, ruling that the plaintiff did not prove a prima facie case of negligence for submission to a jury. The court said that the doctrine of *res ipsa loquitur* could not be applied to food bacteria cases, and that there was no evidence from which a jury could find that the defendant was negligent in preparing the food, or that the defendant's negligence caused the death of the plaintiff's husband. The court further held that there could be no recovery on the basis of a breach of an implied warranty because the warranty did not survive to the wife upon the death of her husband.[1]

There are two theories upon which recovery for injury caused by the presence of a deleterious substance in food may be based: (1) negligence on the part of the dispenser of the food,[2] and (2) breach of an implied warranty.[3] Recovery, of course, may always be had if the plaintiff is able to prove negligence, but because of

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16. Hellerstein, *State and Local Taxation*, 1947 ANNUAL SURVEY OF AMERICAN LAW 321 (1948).

1. Goodwin v. Misticos *et al.*, 42 So.2d. 397 (Miss. 1949).
2. Note, 7 A.L.R.2d 1027 (1949).
3. *Ibid.*